No. 15931

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ANDREW SHANNON, MATTIE SHANNON and ROGER WALTER HARRISON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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I.

Jurisdictional Statement.

On August 14, 1957, an Indictment was filed against appellants in which the Grand Jury for the Southern District of California charged three separate sales of heroin in as many different counts under Section 174 of Title 21, United States Code. Count One charged, in effect, that on May 15, 1957, appellants Andrew Jackson Shannon and Roger Walter Harrison sold approximately one ounce, 198 grains of heroin to Cecil Thomas, which heroin had been imported into the United States contrary to law, as said appellants well knew. Count Two charged, in effect, that on May 17, 1957, appellants Andrew Jackson Shannon and Mattie Shannon sold approximately one ounce, 234 grains of heroin to Cecil Thomas, which heroin had

been imported into the United States contrary to law, as said appellants well knew. Count Three charged, in effect, that on May 23, 1957, appellant Andrew Jackson Shannon sold approximately one ounce, 351 grains of heroin to Cecil Thomas, which heroin had been imported into the United States as said appellant well knew.

The District Court had jurisdiction of the cause under Section 3231 of Title 28, United States Code, which confers on all District Courts original jurisdiction "of all offenses against the laws of the United States."

The jury was selected for the trial of the case on October 29, 1957, and the taking of evidence commenced on October 30, 1957, before the Honorable Peirson M. Hall, Judge presiding. On November 4, 1957, the jury returned a verdict of guilty as charged in each of the three counts, Andrew Jackson Shannon, being guilty of each count, Mattie Shannon, being guilty of Count Two and Roger Walter Harrison being guilty of Count One. On December 2, 1957, Andrew Jackson Shannon was sentenced to a total of fifty years on all three counts. Roger Walter Harrison received a sentence of ten years on Count One. Mattie Shannon received a sentence of fifteen years on Count Two.

On or about December 9, 1957, a Notice of Appeal to this Honorable Court was filed. Thereafter, the Appeal was docketed and Appellants' Opening Brief filed.

Jurisdiction of this court stems from Section 1291 of Title 28, United States Code.

II.

The Statute Under Which the Appellants Were Prosecuted.

The Indictment in this case was brought under Section 174 of Title 21, United States Code, which provides as follows:

> "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000.
>
> * * * * * * * *
>
> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

III.

Statement of the Case.

The sequence of events in this case with respect to the matters pertinent to the issue on appeal is as follows:

Detailed testimony as to the transactions upon which the Indictment was based was offered by the Government during the trial of the case through various witnesses. [Rep.

Tr. pp. 1-254.] Thereafter, the Government rested its case. A discussion was then had between the Court and all counsel with respect to the possible time which would be consumed in finishing the trial. [Rep. Tr. pp. 254-256.] Judge Hall inquired about certain photographs which counsel for the defendants had indicated they might offer in evidence. Upon being informed by one of such counsel that she did not have them in her possession, the court commented that, in effect, that the jury could be sent out to the scene of most of the happenings involved in the case, which was an apartment house on 3703 W. 27th Street in Los Angeles, California.

Mr. Weiss commented: "That would be a great idea" and Mrs. Jefferson stated: "I didn't know whether your Honor would grant such a request." She then went on to say: "I think it is very important. I have been out there."

At that time, Government counsel interposed, in effect, an objection to the jury viewing the property because of the possibility that the premises, particularly shrubbery, may have changed from the time of the events which occurred in May of 1957 to the time of the proposed jury view in November of 1957. [Rep. Tr. pp. 256-257.] After some discussion of this objection, Government counsel was informed by one of the Narcotics Agents that, as far as was known, there had been no definite major "shrubbery" changes and that the premises to all appearances had remained the same. The Court made an order that the jury would be taken out the next day to see the premises at approximately 10:00 A.M. The Court stated:

> "The defendants are entitled to be present *unless they waive that right.* The jury will go out. The jury and the Clerk and myself and the Bailiff will go in

> the bus, and I think you [Mrs. Bulgrin] had better have Mr. Farrington there and Mr. Ross and Mr. Richards. The Court Reporter will go with the jury and the Judge and the Clerk in the bus, and the rest of you will get there by what ever means you can." (Emphasis ours.)

The Court further stated that the defendants themselves would be at the Federal Building at 9:30 A.M. and the Marshal would take them out to the scene. All of this discussion was had in the presence of all counsel and all three defendants. [Rep. Tr. pp. 258-261.]

The record shows that at 9:50 o'clock on November 1, 1957, the Court, jury, Bailiff, and Court Reporter were present at the address of 3703 W. 27th Street, which was located on 27th Street West of 7th Avenue in Los Angeles. Each of the appellants was present, as well as the three counsel for appellants, Mr. Weiss, Mr. Sherman and Mrs. Jefferson. In addition, this writer, as counsel for appellee, was present, together with certain Government and local Narcotics Officers, among whom were Philip P. Ross and William R. Farrington, who had testified in the case.

Since it was obvious from the testimony taken in court that the events which occurred at or near the vicinity of 3703 W. 27th Street involved some of the most important facts in the case, a considerable amount of additional testimony was taken there in the presence of all the above persons, including the three appellants. This testimony was substantially devoted to pointing out the various parts of the area which involved the previous testimony and included reenacting certain events which had been described earlier in court. This was all done without objection from appellants, except as to a few isolated ques-

tions which were asked of the witnesses. In fact, counsel for the appellants all participated in questioning the witnesses. They were given every opportunity to go into any matter they desired with respect to the witnesses' testimony in connection with the premises being viewed by the jury. The jury was also given the opportunity in the presence of the appellants and their counsel to view as much of the property as was relevant to the inquiry in question. They were taken around to the rear of the property, as well as being given an excellent view of the front of the apartment and the particular part of the property on which was the back "stoop" where certain money was left and picked up from underneath a garbage can. They were also shown the area on the opposite side of the street where another transaction took place, in that a quantity of narcotics was alleged to have been left at that point by Cecil Thomas and thereafter picked up by appellant Roger Harrison. [Rep. Tr. pp. 265-297.]

The specific part of the transcript which is particularly involved in the question on appeal is at pages 297-299 thereof, and concerns the approximate time during which the jury left the above address and returned to the Federal Building. However, upon a careful scrutiny of this part of the proceedings, it appears that the transcript is confused as to what occurred, even with the addition of the affidavit by the Court Reporter to the effect that the four sentences on page 299 should be inserted immediately following line 4 on page 298.

Appellee calls this Court's attention to the fact that at page 297 of the Reporter's Transcript of Proceedings, it is set forth that Judge Hall stated: "By the way, here is a wall described by Mr. Farrington with the chain links above it." Immediately thereafter it is noted "(The

following proceedings were had on the bus enroute back from the premises.)" It is after this notation that the testimony appears to be confused.

Immediately following the above notation in parenthesis the transcript shows as follows:

"The Court: Where is the Ralph Market and drug store?

Witness Farrington: At Seventh Avenue and West Washington.

The Court: This is Seventh Street?

Witness Farrington: This is Seventh.

A Juror: We saw it when we turned the corner.

Another Juror: I wonder if we can go back the other way?

The Court: Yes, we can go back up there and come back Washington.

Mrs. Bulgrin: Does the jury wish to see the drug store?

The Court: Just to go by?

Mrs. Bulgrin: Just to go by. I want them to see the phone booth. Then we will proceed back to the Court.

The Court: Very well."

The above quoted material from the transcript does not indicate that those proceedings were had on the bus "enroute back from the premises" as indicated in the statement in parenthesis. In the first place, this writer was not, as shown above from the transcript of proceedings, on the bus with the jury, Bailiff, Reporter and Court. (It is also apparent from the transcript that the witness, Farrington, was not on the bus.) Obviously the participants in the conversation were talking about the return

trip *to be taken.* This is particularly clear when this writer's inquiry was made to the Court as to whether or not the jury wanted to go by the drug store. Thus, this conversation took place in the presence of the appellants, their counsel, government's counsel and all those concerned with the case who had been brought out to the above address.

The material at page 299 which was inserted immediately below the above quoted material is as follows:

> "This is the corner of Seventh Avenue and Washington, and here is a drug store and beyond is a Ralph Market and over there is a parking lot.
>
> Very well."

There is no explicit indication in the transcript as to who made the above statement, as it is now inserted at the place indicated on page 298, but it may have been the Court speaking.

Next shown in the transcript of proceedings is the statement made by this writer concerning the witness Ross' mother going to Mexico and the fact that he was supposed to take her to the airport at 11:00 o'clock. The Government asked that he might be excused at "this" point if the appellants had no objection. There was no objection from appellant's counsel and the witness arranged to be back at 2:00 p.m. That witness was not on the bus either. That is the end of the proceedings which are immediately concerned with the issue on appeal.

As indicated above, the transcript showed that all of the proceedings which we have quoted immediately above took place on the bus. However, it is obvious from the transcript that the witness Farrington was not on the bus, nor was this writer, nor Mr. Weiss or Mr. Sherman or

Mrs. Jefferson. Thus, the conversation could not all have taken place on the bus, if indeed, any of it did, since counsel and the witnesses had driven back in their own transportation.

It is obvious that the only small part of the entire proceedings which could have taken place on the bus in the absence of appellants and counsel was: "This is the corner of Seventh Avenue and Washington and here is a drug store and beyond is a Ralph Market and over there is a parking lot. Very well."

Clearly, before the Court and the jury got on the bus the Court inquired in the presence of the appellants and their counsel as to the location of a Ralph Market and drug store, a location mentioned in the testimony of some of the Government's witnesses. It was also made plain that the appellee was suggesting that the jury "just go by the drug store." There was no objection from counsel for the appellants or appellants to the obvious plan of the Court and the jury to merely ride by a certain Ralph Market and the drug store.

Since there is still a considerable amount of confusion in the pertinent part of the record involved in this appeal, appellee has contacted Agnar Wahlberg, one of the official court reporters involved in the preparation of the records herein, and arranged for him to reexamine his notes upon his return from vacation on or about October 27, 1958. After such an examination is made, appellee will act accordingly in connection with any possible motion to correct the reporter's transcript of proceedings to a further extent.

IV.
Argument.

At the writing of this brief, appellee feels that there is an insufficient record of the proceedings which occurred in the period of time represented by pages 297 to and including 299 of the transcript for this Honorable Court to make any determination whatsoever as to exactly what happened from the time the jury was leaving the vicinity of 27th and Seventh Street in Los Angeles, California up to the time the jury arrived at the Federal Building in Los Angeles on the same day. If the record cannot be clarified to any greater degree than has been shown in the affidavit of Agnar Wahlberg, attached to Appellant's Opening Brief, it is respectfully submitted that the record on that point is in too confused a state for a consideration of the question raised. This is particularly true in view of the fact that the record of proceedings shows that all three appellants received a fair trial and, during the jury's view of the above premises, were afforded a complete opportunity to participate in the questioning of the witnesses at the scene, to view the entire premises and to request the Court to take such action at that time with respect to the trial of the case which would best suit their own interests. They did so participate, the only few objections being to certain isolated questions asked of the witnesses. But, as to the entire proceedings at the above address, appellants' counsel, Mr. Weiss, in particular, thought that the idea was "great" [Rep. Tr. p. 256], beforehand. None of the counsel made a complaint after the jury returned to the Federal Court that the proceedings had been unfair or partial or that the appellants had had an inadequate opportunity to take such action as was deemed warranted for their defense.

Of course, in connection with the state of the record, appellee will make every effort to clarify it before the hearing on the matter, so that the issue raised may be disposed of upon the merits. Assuming that this can be done or that the Court would feel that the present record shows that the jury did drive by the corner of 7th Avenue and Washington and saw the drug store and Ralph Market in passing, appellee will discuss the question of whether or not any error was thus contained in the record.

It is respectfully submitted to this Court that no error is contained in the record and, further, defendant was not prejudiced in any way by the proceedings connected with the jury's alleged view of the said premises.

It is obvious that the most that could have happened after the jury left the vicinity of the address indicated was that they could have gone by the corner of Seventh Avenue and Washington and, in passing by, looked at a drug store and a Ralph Market. It is further evident that, before the jury, Court, bailiff and Reporter left on the bus that this writer discussed in the presence of appellants and their counsel the question of the jury going by the drug store "just to go by." At that point there was no objection or comment made by the counsel for appellants or the appellants to the jury seeing the drug store on their way back to the Federal Building. Further, the record in its present state indicates that the jury, on its way to the address noted above, had seen the Ralph Market at Seventh Avenue and West Washington. [Rep. Tr. p. 297.] There was no complaint from appellants or their counsel because of that fact. During the trip made by the jury to and from the above premises there was no evidence taken from any of the witnesses in the case nor was any

comment made to the jury by counsel for appellee, since neither such witnesses nor this writer were on the bus on either occasion.

Assuming, *arguendo,* that it could be remotely felt that some error occurred in the jury merely traveling by the drug store and Ralph Market, it is clear from the record that the defendants waived any objection to such proceedings by a failure to object with full knowledge of what would probably happen on the route of travel to be taken on the way back to Court. Further, as stated above, in view of the full opportunity of appellants to participate in the proceedings at the jury's view of the other premises, which involved the most important events in the case, there was absolutely no possibility of any prejudice to the appellants.

Although the factual situation in the case of *Deschenes v. United States,* 224 F. 2d 688 at 693 (10 Cir., 1955), was different in that the question involved the lack of appellant's presence at certain conferences between counsel and the Court, the language in the opinion is of interest in the present question.

> "* * * neither appellant nor his counsel made a specific request for appellant to be present at these conferences, and no complaint or objection was lodged to the practice. He therefore cannot complain of any possible prejudice."

Again, in a case involving arguments on objections made by counsel at the bench where defendant was not present, although in the courtroom, the court held the assignment of error was wholly without merit. Although, as in the *Deschenes* case, the situation was different from the facts in within matter, the language of the Court in the *Steiner*

opinion, 134 Fed. 931 (5 Cir., 1943), at page 935, would also be of interest here.

> "Neither he nor his counsel complained or made objection at any time to the practice, and we think it clear that he was in no wise prejudiced. Both he and his counsel were satisfied with the procedure at the trial, and the assignment of error and the contention on the point seems to be *nothing more than an afterthought by which fair conduct, in which they acquiesced and participated, is sought to be distorted into impropriety and alleged prejudicial error.*" (Emphasis ours.)

The above quoted language from the *Steiner* case appears to be descriptive of the situation herein.

In the case of *Ng Sing, et al. v. United States,* 8 F. 2d 919 (9 Cir., 1926), at page 922, it appears that during the trial of the case, which involved a narcotics charge, two of the jurors visited storerooms of the appellant and a place at the rear where the opium was found. Apparently this was done without the knowledge of anyone else involved in the case. The alleged error was contained in a motion for a new trial, which, of course, was addressed to the sound discretion of the trial court. The Court of Appeals held that no abuse of discretion was shown. It is of interest herein that the Court of Appeals stated that it seemed the trial court was convinced the appellants (plaintiffs in error) were in no wise prejudiced by the incident complained of.

It is submitted that the question of prejudice could be considered on such an alleged error on an appeal from a judgment of conviction, and it is clear in the within case that there was no prejudice to any of the appellants by the alleged view of the jury of a drug store and a market on passing by.

Again, in the case of *Cochran v. United States,* 41 F. 2d 193 (8 Cir., 1930), at page 207, it appeared that during the trial and without knowledge of the court or counsel for either side, certain jurors viewed some of the properties involved in the case. This view was not pursuant to direction of the Court or with the knowledge of counsel. The incident was set forth in a motion for a new trial and the Court of Appeals, in discussing the matter, stated with respect to the viewing:

> *"This was not a part of the trial,* and, in the absence of a showing of prejudice is not grounds for reversal. *Valdez v. United States,* 244 U. S. 432, * * *" (Emphasis ours.)

In *Roberts v. United States,* 60 F. 2d 871 (4 Cir., 1932), the matter of four jurors viewing the premises where a crime was alleged to have been committed during the progress of the trial, without authorization, was presented on a motion for a new trial. The Court stated, at page 872:

> "The rule is well settled than an unauthorized view or inspection by members of the jury, while improper, is not ground for a new trial *unless it appears that the verdict was affected thereby.* 20 R.C.L., and cases cited. * * * *There is nothing in the record before us which shows that the defendant was in any wise prejudiced* by the conduct of the jurors in viewing the premises or that the trial Judge abused his discretion in denying the motion for new trial made on that ground." (Emphasis ours.)

Thus, although the error complained of in those three cases was presented on a motion for a new trial rather than as an assignment of error on appeal, it is of interest to note that the Courts of Appeal were primarily concerned

with the question of whether or not the defendant had been prejudiced by the unauthorized action of jurors in viewing certain premises involved in the trial. One Court even stated the Jury view was not part of the trial. (However, it should be noted the view was not under the auspices of the Court.)

The case of *Valdez v. United States,* 244 U. S. 432, *supra,* is also of interest in connection with this question. In that early case, decided in 1917, one of the questions on appeal was, "Whether the absence of the accused during a part of the proceedings in the trial constitutes an error requiring reversal * * *" The case involved a complaint under the procedure of the Philippine Islands for the crime of murder. An inspection of the scene of the murder was made by the trial judge. Valdez, the appellant, was not present but his counsel were.

At page 445 the Supreme Court of the United States, after discussing the facts involved, stated:

> "Such being the record, we must assume that the judge in his inspection of the scene of the homicide was not improperly addressed by anyone and, in the presence of counsel, did no more than visualize the testimony of the witnesses—giving it a certain picturesqueness, it may be, but not adding to or changing it. It would be going a great way to say that the requirement of the Philippine Code, carrying the constitutional guarantee to an accused to 'meet the witnesses face to face,' was violated and could not be waived. And we think practically Valdez' presence was waived.
>
> "But, aside from any question of waiver, it would be pressing the right of an accused too far and *Diaz v. United States,* 223 U. S. 442, beyond its principle

to so hold. As well might it be said that an accused is entitled to be with the judge in his meditations and that he could entertain no conception nor form any judgment without such personal presence.

"The judgment should not be reversed upon a mere abstraction. It is difficult to divine how the inspection, even if the affidavits of the defendants should be taken at their face value, added to or took from the case as presented.

"It follows that the judgment of the Supreme Court must be and it is affirmed." (Emphasis ours.)

In *Snyder v. Massachusetts,* 291 U. S. 97 (Jan. 8, 1934), a trial was held in the State Court of Massachusetts for murder. One of the defendants made the claim on appeal that through the refusal of the trial judge to permit him to be present at a view there had been a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States. There, as in the *Valdez* case, the appellant was not present to view the scene with the jury. However, they were accompanied by the Judge, the court reporter, the district attorney and counsel for the defendant. Likewise, as in the *Valdez* case, the proceedings during the time the jury was viewing the premises were extensive and much attention was given to the details of the scene.

The Supreme Court stated, beginning at page 105:

"We assume in aid of the prisoner that in a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has the relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. Thus, the privilege to confront one's accusers and cross examine

them face to face is assured to a defendant by the Sixth Amendment in prosecutions in the federal court * * * and in prosecutions in the state court is assured very often by the constitutions of the state. For present purposes we assume that the privilege is reinforced by the Fourteenth Amendment, though this has not been squarely held."

The Court went on to quote the case of *Diaz v. United States, supra,* and stated:

"No doubt the privilege may be lost by consent or at times even by misconduct. * * * Our concern is with its extension when unmodified by waiver, either actual or imputed."

The Court went on to say:

"Nowhere in the decisions of this court is there dictum, and still less a ruling, that the Fourteenth Amendment assures the privilege of presence *when presence would be useless, or the benefit but a shadow.* * * * So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

"We are thus brought to an inquiry as to the relation between the defendant's presence at a view and the fundamental justice assured to him by the Constitution of the United States.

"At the outset we consider a bare inspection and nothing more, a view where nothing is said by anyone to direct the attention of the jury to one feature or another. The Fourteenth Amendment does not assure to a defendant the privilege to be present at such time. *There is nothing he could do if he were*

there, and almost nothing he could gain. The only shred of advantage would be to make certain that the jury had been brought to the right place and had viewed the right scene. If he felt any doubt about this, he could examine the bailiff at the trial and learn what they had looked at. * * * Here the chance is so remote that it dwindles to the vanishing point. * * * *There is no immutable principle of justice which secures protection to a defendant against so shadowy a risk.* The argument is made that conceivably the place might have been changed in a way that would be material. * * * Indeed the record makes it clear that upon request he would have been allowed to go there afterwards in company with his counsel. Opportunity was ample to learn whatever there was need to know."

* * * * * * *

"If the risk of injustice to the prisoner is shadowy at its greatest, it ceases to be even a shadow when he admits that the jurors were brought to the right place and shown what it was right to see. That in substance is what happened here. * * * Nowhere is there a suggestion of any doubt as to the place." (Emphasis ours.)

The Court then went on to talk about an inspection where counsel are permitted, without any statement of the evidence, to point out particular features of the scene and to request the jury to observe them. The Court stated that Massachusetts law holds that such statements, so restricted, are proper incidents of a view. At page 116, after discussing fully the problem, the Court said:

"* * * Nor has the defendant been denied an opportunity to answer and defend. The Fourteenth Amendment has not said in so many words that he

> must be present every second or minute or even every hour of the trial. * * * Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute concept."

The Court then discussed in several more pages the question of whether or not the defendant had been denied his constitutional rights, commenting at page 119:

> "Other courts have held, and plainly with the better reason, that physical objects are not witnesses, even though they have the quality of evidence, and that the defendant is at liberty to waive the privilege to view them, if such a privilege exists. * * *"

Of course, the Court noted that Massachusetts law is to the effect that waiver is unnecessary and that the defendant may be excluded in the discretion of the judge. (Counsel for the appellant in the *Snyder* case had moved that his client be permitted to view the scene with the jury and the motion had been denied by the trial court.) Still, the Supreme Court of the United States affirmed the judgment below, stating that the Supreme Court would not supersede the judicial decisions of Massachusetts on the ground that they deny the essentials of a trial because opinions may differ as to their policy of fairness.

Thus, although there seems to be no federal decision directly in point of the situation herein, and it does not appear that the federal rule has been heretofore clarified, it is submitted that the rule should follow the reasoning of the *Snyder* case, that: "* * * to make the securities of the Constitution depend upon such quiddities is to cheapen and degrade them." (P. 122.) Apparently the Supreme Court there felt that the defendant is at liberty to waive the privilege to view physical objects, *if such a privilege*

exists. In the within case there was certainly a waiver of any such privilege to view the premises with the jury. Even aside from the question of waiver (or lack of prejudice on a *de minimis* principle) with respect to Rule 43 of the Federal Rules of Criminal Procedure, it is not said in so many words that the defendant must be present "every second, or minute, or even every hour of the trial" because "fairness is a relative, not an absolute concept." Particularly in the instant case, there is a "* * * shadowy relation between the defendant present at such a time and his ability to defend * * *" Thus, along with the general language of the *Snyder* case, the appellee submits that it could well be said a privilege extended at all to the brief view which may have been taken in this case.

It is thus urged that the judgment below should be affirmed so that "* * * gossamer possibilities of prejudice to a defendant" would not "nullify a sentence pronounced by a court of competent jurisdiction in obedience to * * * law, and set the guilty free."

Respectfully submitted,

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